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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

PHASE II CHIN, LLC and LOVE &  
MONEY, LLC, formerly O.P.M.L.V.,  
LLC,

Plaintiffs,

v.

FORUM SHOPS, LLC, FORUM  
DEVELOPERS LIMITED  
PARTNERSHIP, SIMON PROPERTY  
GROUP LIMITED PARTNERSHIP,  
SIMON PROPERTY GROUP, INC.,  
CAESARS PALACE CORP, CAESARS  
PALACE REALTY CORP., DOES 1  
through 20, AND ROE CORPORATIONS  
1 through 20,

Defendants.

Case No. 2:08-cv-00162-JCM-GWF

**PLAINTIFFS' JOINT REPLY TO SUPPLEMENTAL MEMORANDUM FILED BY  
DEFENDANTS FORUM SHOPS, LLC, FORUM DEVELOPERS LIMITED  
PARTNERSHIP, SIMON PROPERTY GROUP LIMITED PARTNERSHIP, SIMON  
PROPERTY GROUP, INC. IN SUPPORT OF MOTION TO DISMISS**

1 On September 24, 2008, Defendants Forum Shops, LLC, Forum Developers Limited  
2 Partnership, Simon Property Group Limited Partnership, and Simon Property Group, Inc. (the  
3 “Forum Defendants”) filed a “Supplemental Memorandum” in support of their Motion to  
4 Dismiss raising, for the first time, the claim that Plaintiffs’ causes of action for interference with  
5 contractual relations, interference with prospective business advantage, injunctive relief,  
6 violation of 42 U.S.C. § 1981 and conspiracy are barred by the litigation privilege because the  
7 Forum Defendants’ liability is purportedly based on the sending of four letters prior to the  
8 commencement of the Defendants’ litigation in Delaware against Plaintiffs. Forum Defendant’s  
9 argument is without merit for the following two reasons:

10 First, the Forum Defendants’ privilege defense encompasses factual issues that cannot be  
11 resolved on a motion to dismiss; and

12 Second, the Forum Defendants’ liability in this case is based on more than the four letters  
13 referenced in the Supplemental Memorandum.

#### 14 ARGUMENT

##### 15 A. The Forum Defendants’ Privilege Defense Cannot Be Decided On A Motion 16 To Dismiss.

17 The Forum Defendants have improperly requested that the Court resolve, on a motion to  
18 dismiss, the factual issue of the possible application of the litigation privilege to four letters  
19 which form only a part of Plaintiffs’ allegations. Not only do the Forum Defendants ignore that  
20 it is their burden to establish such a litigation privilege, but the determination of whether  
21 prelitigation communications are privileged requires the resolution of factual issues that cannot  
22 be determined at the pleading stage. *See Meltzer v. Grant*, 193 F. Supp. 2d 373 (D. Mass. 2002)  
23 (issue of whether pre-litigation letter was absolutely privileged could not be determined on  
24 motion to dismiss).

25 As the Nevada Supreme Court has held, when the communication at issue was “made  
26 before a judicial proceeding is initiated, it will be cloaked with immunity only if the  
27 communication is made in contemplation of initiation of the proceeding. In other words, at the  
28 time the defamatory communication is made, the proceeding must be contemplated in good faith

1 and under serious consideration.” *Fink v. Oshins*, 118 Nev. 428, 433 (Nev. 2002) (emphasis  
2 added). As the Restatement notes, this is because “the bare possibility that the proceeding might  
3 be instituted is not to be used as a cloak to provide immunity for defamation when the possibility  
4 is not seriously considered.” Rstmt (2d) Torts § 586, com. e. The California Supreme Court, in  
5 rejecting the claim that eviction notices are always shielded by the litigation privilege, reasoned  
6 that “[n]o public policy supports extending a privilege to persons who attempt to profit from  
7 hollow threats of litigation.” *Action Apartment Ass’n, Inc. v. City of Santa Monica*, 41 Cal. 4th  
8 1232, 1251 (2007).

9 The fact that the letters were sent prior to the litigation distinguishes this case from the  
10 decision cited by the Forum Defendants, *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby,*  
11 *LLP*, 440 F. Supp. 2d 1184 (D. Nev. 2006), because the *Crockett* court expressly based its ruling  
12 on the belief that Nevada courts would hold that “the policy considerations surrounding the  
13 attorney-client relationship and the communications related to ongoing judicial proceedings  
14 privilege would protect an attorney's communications to his client in the course of representing  
15 her in an ongoing proceeding ” *Id.* at 1196-97 (emphasis added). *Crockett* does not deal with  
16 prelitigation communications between the parties, and thus has no application to this case.

17 Far more on point is the *Meltzer* case, in which the District Court for Massachusetts  
18 analyzed whether it could grant a motion to dismiss based on the defendant’s claim that a  
19 prelitigation communication was privileged. *Meltzer v. Grant*, 193 F. Supp. 2d 373 (D. Mass.  
20 2002). The court rejected the defendant’s privilege argument, holding (consistent with Nevada  
21 law) that the litigation privilege only applied to prelitigation letters when those letters were sent  
22 when “judicial proceedings [were] contemplated in good faith and under serious consideration.”  
23 *Id.* at 381. Because the plaintiffs in that case disputed whether litigation was contemplated in  
24 good faith and under serious consideration, the court held that “the matter is not properly  
25 resolved on a motion to dismiss,” because such a motion can only be granted “when the  
26 entitlement to the privilege is demonstrated by the complaint itself, taking all allegations of the  
27 complaint as true and drawing all reasonable inferences in favor of the plaintiffs.” *Id.*

28 Accordingly, cases such as *1100 Park Lane Associates v. Feldman*, 160 Cal. App. 4th

1 1467 (2008), lend no support for the Forum Defendants' claim that the Court can apply the  
2 litigation privilege as a matter of law. First, in *1100 Park Lane Associates*, there was no real  
3 question that litigation was under "serious consideration" at the time the eviction notice was  
4 served, as the landlord initiated the eviction proceedings a mere six weeks after serving the  
5 notice. *Id.* at 1488. Second, *1100 Park Lane Associates* was not decided on the pleadings – the  
6 court specifically notes that it is basing its holding on evidence establishing that the privilege  
7 applied and that the plaintiff would not be able to prevail at trial. *Id.* at 1491. Third, contrary to  
8 the Forum Defendants' assertion that eviction notices are always privileged, *1100 Park Lane*  
9 *Associates* explicitly recognizes that a notice of eviction is only privileged to the extent that it  
10 "relates to litigation that is contemplated in good faith and under serious consideration." *Id.* at  
11 1487, quoting *Action Apartment*, 41 Cal. 4th at 1251.

12 Thus, in order to establish that the letters were privileged, the Forum Defendants will  
13 need to prove (among other things) that the letters were sent when litigation was contemplated in  
14 "good faith and under serious consideration." However, the Forum Defendants have submitted  
15 no evidence of their good faith (nor could they on a motion to dismiss). Indeed, the Court does  
16 not even have all of the allegedly privileged letters before it. The letters are not attached to the  
17 Complaint, nor were they provided to the Court as part of the Forum Defendants' Motion to  
18 Dismiss.<sup>1</sup> There are simply no facts on which the Court can determine the Forum Defendants'  
19 intent in sending the letters.

20 Indeed, to the extent that there are any facts relating to this issue, they support the  
21 contrary conclusion that there was no good faith contemplation of litigation. For example, the  
22 Complaint alleges that the Forum Defendants engaged in a campaign of misconduct designed to  
23 harass the Plaintiffs for racially and financially motivated reasons – not to protect their legal  
24 rights. *See* Complaint ¶¶27, 32. Moreover, as alleged in the Complaint, the Forum Defendants  
25 sent the first letter on March 6, 2006, more than a year and a half prior to filing their lawsuit in  
26 Delaware. *See* Complaint ¶43; Motion to Dismiss, Ex. E. The extreme delay between sending

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27 <sup>1</sup> Only one letter (Exhibit D to the Motion) was provided to the Court.  
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1 this letter and filing the Delaware action strongly suggests that litigation was not “under serious  
2 consideration” when the letter was sent.

3 By their Supplemental Memorandum, the Forum Defendants are improperly requesting  
4 that the Court make a factual determination that the threat of litigation was made in good faith  
5 and was under serious consideration when the letters were sent, and thus Plaintiffs’ claims  
6 cannot be dismissed on the basis of privilege. *See Meltzer*, 193 F. Supp. 2d at 381; *Action*  
7 *Apartment*, 41 Cal. 4th at 1252 (holding that “[b]ecause a factual inquiry is required in order to  
8 determine whether a particular eviction notice is privileged, it is impossible to conclude that the  
9 litigation privilege would bar every action . . . based on unfounded notices of eviction”).

10 **B. The Forum Defendants’ Liability In This Case Is Based On More Than**  
11 **Their Improper “Notices of Default”.**

12 The Forum Defendants are also incorrect when they assert that Plaintiffs’ allegations  
13 against the Forum Defendants only rest on the letters attached to their Motion to Dismiss.

14 The Complaint alleges far more than the letters, including facts relating to the Forum  
15 Defendants’ interference with Plaintiffs’ contracts and discrimination against Plaintiffs and  
16 Plaintiffs’ customers by, among other things, blaming Plaintiffs’ customers for all security  
17 problems at Caesars involving African Americans and treating Plaintiffs less favorably than  
18 other tenants at the Forum Shops. *See* Complaint ¶¶30, 31. For example, in February 2006, the  
19 Forum Defendants attempted to blame Plaintiffs for an altercation that occurred in the Caesars  
20 parking lot, even though the fight did not occur near Plaintiffs’ establishments and there was no  
21 evidence that the individuals were Plaintiffs’ customers. Complaint ¶40. Additionally, the  
22 Forum Defendants accuse Plaintiffs of permitting crowds to gather outside of the club, yet they  
23 regularly permit crowds to gather outside of other venues in the Forum Shops. Complaint ¶55.

24 Furthermore, Plaintiffs have alleged that the Forum Defendants conspired with the  
25 Caesars defendants to harass the Plaintiffs and interfere with Plaintiffs’ relationships with their  
26 customers. As part of this conspiracy, the Caesars defendants have, among other things:

- 27 • interfered with Plaintiffs’ customers’ ability to gain access to the club by closing  
28 the door separating Caesars’ casino from the Forum Shops during the club’s

busiest hours, even though it will keep the door open for other Forum Shops tenants (Complaint ¶¶59-62);

- closed the main entrance to the Forum Shops, thus forcing Plaintiffs’ customers to walk around the casino on a street with no sidewalk (Complaint ¶65); and
- claimed that they have a “problem . . . with the customers that OPM attracted” (Complaint ¶42).

If Plaintiffs establish that the Forum Defendants conspired with the other defendants to harass Plaintiffs and interfere with Plaintiffs' contracts, then the Forum Defendants would be held liable for the Caesars defendants' actions. *See Hilton Hotels Corp. v. Butch Lewis Prods.*, 109 Nev. 1043, 1049 (Nev. 1993). The Forum Defendants do not (nor could they) argue that the Caesars defendants' wrongful acts alleged in the Complaint are privileged.

Moreover, to the extent that the Forum Defendants are claiming that the Complaint contains insufficient allegations of the Forum Defendants' misconduct, Plaintiffs are not required to allege every instance of wrongful conduct in the Complaint – as noted in the Complaint, the specific factual allegations regarding Defendants' wrongdoing is not “an exhaustive inventory.” Complaint ¶33; *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (“a complaint is not required to allege all . . . of the facts logically entailed by the claim . . . a complaint does not fail to state a claim merely because it does not set forth a complete and convincing picture of the alleged wrongdoing.”).

Finally, the Forum Defendants’ new position conflicts with its own assertion in the Motion to Dismiss, in which it stated that the allegations against the Forum Defendants include “letters and visits from Defendants<sup>2</sup> regarding Chinois’ violations of the lease.” Motion to Dismiss at 22 (emphasis added).

## CONCLUSION

For the foregoing reasons, and those set forth in Plaintiffs' Opposition briefs and their

<sup>2</sup> The term “Defendants” is defined in the Motion to Dismiss as the Forum Defendants. *See* Motion at p. 1.

1 Joint Sur-Reply, Plaintiffs respectfully request that the Court deny the Forum Defendants'  
2 Motion to Dismiss.

3 Dated: October 15, 2008

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4  
5 /s/ Harold P. Gewerter, Esq.

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